IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-428

SHEARN MOODY, JR.,

Petitioner,

VS.

STATE OF ALABAMA, EX. REL. CHARLES H. PAYNE, COMMISSIONER OF INSURANCE AND RECEIVER OF EMPIRE LIFE INSURANCE CO., OF AMERICA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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SUBJECT INDEX

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NOW COMES Petitioner, Shearn Moody, Jr., and files his Reply to the Brief in opposition of the Respondent, State of Alabama Ex Rel Charles H. Payne, Commissioner of Insurance and Receiver of Empire Life Insurance Company of America:

I.

THE ALABAMA SUPREME COURT ARBITRARILY DISCRIMINATED AGAINST THE ASSERTION OF THE FEDERAL CONSTITUTIONAL ISSUES RELATIVE TO THE FINDING OF EMPIRE'S INSOLVENCY.

The arbitrariness of the refusal of the Alabama Supreme Court to review the issue of the insolvency of Empire Life Insurance Company of America ("Empire") in connection with the judgment authorizing Empire's liquidation and reinsurance is evident from the record. The Domiciliary Receiver alleged that Empire was insolvent in his Petition for authority to liquidate and reinsure Empire. Intervenor,

Protective Life Insurance Company of America ("Protective") admitted at the hearing on the Receiver's Petition that insolvency was one of the issues to be resolved at the hearing in 1974 (R. 2998), and indeed, at that hearing the trial court granted the Petitioner a standing objection to every bit of evidence admitted and every ruling made (R. 1687). The trial court expressly found in its decree of June 14, 1974 granting the Receiver's Petition that Empire was insolvent. In light of the foregoing, the holding that the issue of insolvency was not properly preserved for appellate review must certainly fall.

Further, the Alabama Supreme Court expressly held in its opinion that the objections by the Petitioner to the discriminatory aspects of the Treaty of Assumption and Bulk Reinsurance were properly raised and preserved by him for appellate review since:

> " . . . the trial court trying the case under equity rules, expressly gave the parties a standing objection to 'every bit of evidence' and 'to every ruling'. In this posture we consider that the objection was timely made." (A-4)[1]

Since the Alabama Supreme Court, contrary to the Respondent's assertion, did acknowledge the Petitioner's objections to the Treaty in light of the trial court's ruling, it should have acknowledged the Petitioner's objection to the finding of Empire's insolvency contained in the same document in which his objections to the Treaty were contained. (A13-A26).

From the foregoing it is clear that the Alabama Supreme Court arbitrarily chose to find that the Petitioner had not preserved for appellate review the issue of insolvency and accordingly such arbitrary refusal on

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[1]References to page numbers preceded by the letter "A" denotes reference to the appendix filed by the Petitioner along with his Petition for Writ of Certiorari.

the part of the Alabama Supreme Court does not bar review in this Court of the federal constitutional claims pertaining to the issue of insolvency.

II.

THE RETROACTIVE APPLICATION OF THE 1972 ALABAMA INSURANCE CODE SECTION 748 (2)(b) WHEREBY EMPIRE WAS DECLARED INSOLVENT BY VIRTUE OF A 1970 EXAMINATION REPORT DEPRIVED EMPIRE'S POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF THEIR PROPERTY WITHOUT DUE PROCESS CONTRARY TO THE FOURTEENTH AMENDMENT AND IMPAIRED THEIR CONTRACTUAL RELATIONSHIPS WITH EMPIRE IN VIOLATION OF ARTICLE 1, SECTION 10 OF THE UNITED STATES CONSTITUTION.

Contrary to the assertion of the Respondent that the Alabama Insurance Commissioner did not rely upon 748 (2)(b) of the Alabama Insurance Code, it is clear from the testimony of the former Alabama

Commissioner of Insurance, John G. Bookout, in a hearing conducted in 1972 that he relied on Section 748 (2)(b) of the Alabama Insurance Code when he devalued Empire's interest in the Libbie Shearn Moody Trust.

> Q. (Petitioner's counsel) I will ask him that question. Mr. Bookout, was it your impression, when you stated, as you did, that the law requires you only to find the value of an asset to be what it could be sold for, is that your understanding?
>
> A. (Bookout) Well, I believe the law was read here. [R.224]

The Receiver's counsel had previously read into evidence Section 748 (2)(b) of the Alabama Insurance Code by which he attempted to establish that an admitted asset of an insurance company in Alabama must be subject to being liquidated in order to pay the claims of a company. (R. 212).

Furthermore, if the Alabama Insurance Commissioner was not following established statutory procedure with regard to the

devaluation of Empire's assets then his devaluation of the trust interest was clearly arbitrary and capricious since there were apparently no definitive criteria for the valuation of Empire's trust interest if the Commissioner was not in fact retroactively applying Section 748 (2)(b). As pointed out in the Petitioner's Petition for Certiorari, Commissioner Bookout had ignored the gradual program of devaluation proposed by his predecessor in office, Mr. Frank Ussery who had proposed that the $14,000,000 valuation assigned to Empire's trust interest be gradually devalued. Bookout's valuation of the trust interest at $4,250,000 was clearly a radical departure from the proposed program of gradual devaluation proposed by Commissioner Ussery, and so arbitrary as to effect a denial of due process.

III.

EMPIRE'S CREDITORS WERE DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW SINCE THEY WERE NOT PROVIDED WITH NOTICE OR A HEARING AT WHICH TO DETERMINE THE ADEQUACY OF THE $2,000,000 FUND TO PAY THEIR CLAIMS AS WELL AS THE EXPENSES OF ADMINISTRATION.

As pointed out by the Petitioner, the former Commissioner of Insurance, John G. Bookout, testified to the effect that he was unaware of the basis for the selection of the $2,000,000 figure. It is also significant to note that the trial court's personal advisor, Paul Carr, also testified that:

> "As I recall, the figure was pretty much just picked out of the blue." (R. 5679).

Carr admitted that he could not recall any specific basis for the selection of the $2,000,000 figure (R. 5638-39). It is

clear therefore, that the Alabama Supreme Court erred when it concluded that there was sufficient evidence to establish the adequacy of said sum to pay the creditor's claims.

Further, as pointed out by the Petitioner in his Petition for Certiorari, the debts which Protective refused to assume under the Reinsurance Agreement are numerous and will in all likelihood consume the $2,000,000 fund set aside for the payment of creditors' claims and expenses of administration. (Pet. for Cert. pages 26-27). Unfortunately, there has been no computation of the amounts of liabilities which Protective has refused to assume and therefore the trial court had no way of knowing whether the creditors whose debts were not assumed received more or less than those whose debts were assumed by Protective. The foregoing clearly under-

scores the lack of equal protection being accorded to those creditors whose claims are not assumed by Protective and who were denied an opportunity to appear at a hearing and to contest the adequacy of the $2,000,000 fund to pay their claims.

IV.

THE FORMER ALABAMA COMMISSIONER OF INSURANCE, JOHN G. BOOKOUT, CAUSED DEFAMATORY NEWSPAPER ACCOUNTS TO BE PUBLISHED REGARDING EMPIRE IN VIOLATION OF THE ALABAMA INSURANCE CODE AND THEREBY PREVENTED EMPIRE FROM HAVING A FAIR AND IMPARTIAL RECEIVERSHIP PROCEEDING IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

One of the most important fundamental rights assured to each citizen of the United States is the protection against arbitrary and unlawful conduct by state officials and the deprivation of life, liberty or

property without the due process of law guaranteed by the Fourteenth Amendment.

In recognition of the foregoing Constitutional rights, the State of Alabama has chosen to provide in its insurance code several provisions protecting the fundamental rights afforded by the Fourteenth Amendment to those engaged in the insurance business. One such provision is Title 28A §235, entitled "Defamation", and provides as follows:

> No person shall make, publish, disseminate or circulate, directly or indirectly or aid, abet or encourage the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false or maliciously critical of or derogatory to the financial condition of an insurer or of an organization in proposing to become an insurer and which is calculated to injure any person engaged or proposing to engage in the business of insurance. (1957 p. 856, §4, approved September, 1957; 1971, No. 407 effective Jan. 1, 1972).

A violation of the Alabama Insurance Code carries with it the following penalties:

> Section 15 entitled "General Penalty"' Each willful violation of this code for which a greater penalty is not provided by another provision of this code or by other applicable laws of the state, shall in addition to any applicable described denial, suspension or revocation of certificate of authority, or license be punishable as a misdemeanor upon conviction by a fine of not more than $1,000.00 or by imprisonment in the county jail or by sentence to hard labor for the county for a period of not to exceed one year or by both such fine and imprisonment or hard labor in the discretion of the court. Each instance of violation shall be considered a separate offense.

Despite the existence of Section 235, the former Alabama Commissioner of Insurance, John G. Bookout, proceeded to violate Section 235 by leaking derogatory and malicious financial information to the Montgomery Advisor newspaper regarding a number of Alabama insurance companies, including Empire Life, which prominently

appeared on the front page of that newspaper in a series in order to create the climate whereby the commissioner of insurance appeared to have no choice but to place Empire in receivership. The following is a schedule of the malicious news leaks that appeared on the front page of the Montgomery Advisor in early 1972:

DATE	NEWSPAPER	HEADLINES
12/30/72	Montgomery Advisor	Empire Life Ins. Co. in Alabama Insolvent, Audit Shows
2/10/72	Montgomery Advisor	False Missing Record Fog Empire Life Possible Interest Conflicts Cited In Report on Empire
2/13/72	Montgomery Advisor	Mutual Recovered $1,000,000 It Paid For Notes After Bookout Filed Suit

4/5/72	Montgomery Advisor	Bookout Asks O.K. To File Suit Against Empire Life
4/7/72	Montgomery Advisor	Texas Freezes Empire Life Assets Assume Supervision
4/11/71	Montgomery Advisor	Bookout Will Decide If Empire Is Solvent Empire Gave $30,000 To Wallace Campaign
4/15/72	Montgomery Advisor	Empire Life's Subsidiary Restrained
5/28/72	Montgomery Advisor	American Benefit Life Insurance Insolvent Audit Shows
5/30/72	Montgomery Advisor	Policy Holders Face Loss In $1,000,000 Entry Missing In Roussel Ins. Firm

The release of these malicious and derogatory news stories to the Alabama newspapers in violation of Section 235 of

the Alabama Insurance Code was caused by former Alabama Commissioner of Insurance, John G. Bookout, as evidenced by deposition testimony taken in connection with several lawsuits arising out of the companies that Bookout placed in receivership in the State of Alabama.

The following excerpt is taken from a deposition taken of the Attorney General of the State of Alabama, William Baxley, September 8, 1976, and on page 52 of that deposition he was asked the following question regarding the articles which appeared in the Montgomery Advisor:

> Question:
>
> Did you release the contents of your letter to the Montgomery Advertiser? (Referring to the letter the former Texas Attorney General Crawford Martin had sent to the Alabama Attorney General Baxley concerning putting Empire Life in Receivership).
>
> Answer:
>
> No, sir, I don't believe so - judging from the tenor of that

> story, the way its written, looks like it was released by Bookout. At that time he was sniping back to me as well as me at him, and apparently he ran down with his reply. Just reading the story it looks like he was trying to get there first, saying that "I have asked Baxley to file this suit".

The preceding excerpt shows that the Alabama Insurance Commissioner under state law was leaking malicious news articles critical of the financial condition of Empire in violation of Section 235 of the Alabama Insurance Code to the press in early 1972.

Indeed, such conduct was a blatent denial of Empire's right to a fair and impartial receivership hearing as guaranteed, not only by the Fourteenth Amendment, but also by Article I, Section 13 of the Alabama Constitution which provides that " . . . right and justice shall be administered without sale, denial or delay."

The prejudicial impact of the publication of this information regarding Empire tainted the receivership proceeding and denied it the minimum that due process requires, a fair and impartial hearing.

V.

EMPIRE LIFE INSURANCE COMPANY OF AMERICA WAS DENIED A FAIR AND IMPARTIAL RECEIVERSHIP PROCEEDING IN THE STATE OF ALABAMA BECAUSE THE ANCILLARY RECEIVERS OF EMPIRE IN TEXAS AND ARKANSAS COERCED AND INTIMIDATED THE DOMICILIARY RECEIVER INTO LIQUIDATING EMPIRE.

Shortly after Empire was placed in receivership in 1972, the trial court directed the Domiciliary Receiver, John G. Bookout, to take whatever action was necessary to rehabilitate Empire and to solicit proposals for the rehabilitation of the company. Several proposals for the rehabilitation of Empire were presented, including one by Petitioner Moody. Unfortunately, the Ancillary Receivers of Empire in the states of Arkansas and Texas intimidated and coerced the Domiciliary Receiver into

rejecting all of the rehabilitation proposals and requesting the liquidation of and reinsurance of Empire. During the period in which Empire was to be rehabilitated, Mr. Clay Cotten, former Texas Commissioner of Insurance, wrote Bookout and instructed him that any rehabilitation of Empire would be unacceptable [R. 3087]. Outrageously enough, the Texas and Arkansas Ancillary Receivers also communicated their adamant opposition to the rehabilitation of Empire, not only to the Domiciliary Receiver but also in ex parte fashion to the Domiciliary Receivership Court. Such behavior is unprecedented in insurance company receiverships and was so blatantly calloused and defiant with regard to established judicial procedure that the receivership proceedings were ineradicably tainted and accordingly denied to

Empire policyholders, stockholders and creditors the minimum degree of fairness that due process requires; i.e., a full and fair hearing before an impartial tribunal.

During the liquidation proceedings conducted in Alabama in 1974, Mr. Herbert Crook, the Texas Ancillary Receiver, was asked the following questions by Mr. Webb, counsel for the domiciliary receiver:

> Q. Do you know whether or not Empire Life Insurance Company of America was placed in conservatorship prior to going into receivership?
>
> A. I don't know whether that step was taken and (R.2307) Mr. George, I believe, was appointed. Now, in view of the fact that there was pending in Alabama a court hearing to determine whether or not it should be placed in receivership in the state of its domicile, my best recollection is that the commissioner did not proceed to this step of conservation and take it over, but merely retained a supervisor in the company

to have this negative effect while the action was pending over here in Alabama. (R. 2308).

Q. Alright, Mr. Crook. Were you aware of any agreement or commitment made Odom, Cotton, or anyone else of the Texas Insurance Department with Protective Life, other than those as reflected in the original bid and the first and second amendments on file with this Court?

A. In the meeting at Las Vegas, Protective asked that the bonds that were carried in Empire's portfolio be allowed to be carried at the same amortized value in Protective's portfolio after the reinsurance agreement, rather than treating the reinsurance agreement as a sale of those bonds, which would require them to go back and put them on their books at today's market, which would be substantially lower than that, but that was something that, from my discussion with (R. 204) examiners in any department would treat them that way anyway, but Mr. Cotten gave them that commitment. There was one other commitment along the same lines, and I can't recall what it was right now.

Q. These commitments have been brought to Judge Barber's attention and anything that has been filed in this Court up until the present day, Mr. Crook?

A. I don't know, they had to do with the regulatory autority of the Department of Insurance, and I don't think Judge Barber has too much control over the regulatory authority of the State Department of Insurance of the State of Texas (R.2293).

The foregoing testimony documents discrimination as well as implies the use of threats, and intimidation by a regulatory agency and serves to document the Texas Insurance Department's utter disregard for the domiciliary receivership court which Mr. Crook constantly intimidated with his unauthorized presence throughout the entire trial.

VI.

THE COURT WAS POWERLESS TO ORDER AND FORCE THE PLAINTIFF INSURANCE COMMISSIONER TO DO ANYTHING AS THE PLAINTIFF WAS THE STATE'S FINAL REGULATORY AUTHORITY OVER INSURANCE MATTERS AND AS SUCH THE COURT WAS POWERLESS TO RENDER AN INDEPENDENT JUDICIAL DECISION OR GRANT DUE PROCESS AS REQUIRED BY THE FOURTEENTH AMENDMENT TO

THE U.S. CONSTITUTION AND HENCE THE STATE COURT JUDGMENT OR FINDING IS NULL AND VOID AND NOT ENTITLED TO FULL FAITH AND CREDIT BY OTHER COURTS.

During the proceedings before the Alabama receivership trial court, the Insurance Commissioner, John Bookout, pleaded and alleged that he alone (by Alabama Statute under the new insurance code and not the court) had the final authority to determine asset valuations and this is exactly what the receivership court held.* Commissioner Bookout as Alabama Insurance Commissioner went to Alabama legislature for statutory authority to extend his office's control over the life insurance industry and had the Alabama legislature adopt a new insurance code. Is the Alabama Insurance Code constitutional when it provides the

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* The Court accepted in total the Insurance Commissioner's valuation of Empire Life's assets and the Court did not vary on its own any of those asset valuation findings.

Commissioner of Insurance with unbridled discretion as to the valuation of admitted assets? The Code fails to provide for prior notice or a hearing as to the reasonableness of valuations proposed by the Commssioner before they become effective.

> §745. "Assets" defined. -- In any determination of the financial condition of an insurer, there shall be allowed as assets only such assets as are owned by the insurer and which consist of:
>
> * * *
>
> (13) Other assets, not inconsistent with the provisions of this section deemed by the commissioner to be available for the payment of losses and claims, at values to be determined by him. (1965, P.1057, appvd. Aug.26, 1965; 1971, No. 407, effective Jan. 1, 1972.)

> §749. Valuation of other Secutities. (1) Securities, other than those referred to in Section 749, held by an insurer shall be valued in the discretion of the Commissioner at their market value or at their appraised value, or at prices determined by him as representing their

fair market value. *
[Emphasis added.]

The Insurance Commissioner is clearly a state official and even if he is vested with judicial powers by special interest Alabama statutes, he cannot rely on these statutes and powers to undo the civil and constitutional rights guaranteed by the U.S. Constitution to its citizens. Over 40,000 policyholders, 20,000 stockholders and numerous creditors had their property rights either partially or totally confiscated as a result of the arbitrary devaluation of Empire's interest in the Libby Shearn Moody Trust by the Commissioner of Insurance.

The Alabama receivership court authorized its receiver, John Bookout to prosecute

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* Alabama Insurance Code effective January 1, 1972. See also Sections 745 through 753 of the Alabama Insurance Code.

petitioner, Shearn Moody, Jr., in a derivative stockholders suit (R.1066-1075) as an outgrowth of the liquidation of Empire Life by the receivership court. **Payne v. Moody, CA3-5678-D N.D. Tex.) In the receiver's action in federal court, counsel for the receiver submitted the Alabama receivership court order (R.6265-6266) showing an alleged $6,000,000 insolvency of Empire Life and alleged that Petitioner Moody was responsible for the alleged insolvency.

In his effort to prove damages in the federal court action, the receiver relied upon the Alabama receivership court judgment which devalued the Libbie Shearn Moody Trust asset of

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** Bookout was succeeded by Charles H. Payne, as receiver for Empire and therefore substituted for Bookout as Plaintiff.

Empire Life by $10,000,000 with the stroke of a pen.

Can the Alabama receiver, who has effectively denied a defendant (Moody) due process in the Alabama state courts on asset valuations, be permitted to complain in federal court and seek to have the federal courts invoke their judicial process over a defendant's personal property, in order to enforce the previously quoted Alabama Insurance Statute, Section 759, which prevented the Alabama court from rendering an independent decision of its own on assets valuations?

Can a successor Insurance Commissioner (Bookout) undo retroactively the asset valuations of his two immediate predecessor Alabama Insurance Commissioners who had given express written approvals concerning the $14,000,000 value of Empire

asset valuation. The receivership court's finding of insolvency was based upon statutory insurance accounting principles and not on actual or real insolvency as no value or credit was given for $7,373,953.23 (5218) of non-admitted assets and $2,319,997.98 of non-ledger assets (5218) and in 1970 Empire Life had $23,712.78 of Non-admitted assets (64) and $257,654,628.00 insurance in force as of December 1971 (5271) which had a real or actual value of $6,400,000 (3313) (See Appendix A attached). If value allowed for assets which had a real value and yet for which no value was allowed such as $23,712,463.78 non-admitted assets, $6,400,000 insurance in force or $10,000,000 additional value for the Libbie Shearn Moody Trust, Empire

Life would not have been allegedly insolvent and there would have been no excuse to give Empire Life to Commissioner Bookout's friend and Judge Barber's constituent, Protective Life.

VII.

EMPIRE LIFE AND PETITIONER MOODY WERE DENIED A FAIR, IMPARTIAL, JUST AND EQUITABLE QUASI-JUDICIAL ADMINISTRATIVE HEARING BEFORE THE ALABAMA INSURANCE COMMISSIONER ON APRIL 10, 1972, AS THE COMMISSIONER WAS PREJUDICED, BIASED, UNFAIR, UNJUST, AND PARTIAL AGAINST PETITIONER MOODY AND EMPIRE LIFE AND AS SUCH EMPIRE LIFE AND PETITIONER MOODY HAD THEIR PROPERTY CONFISCATED WITHOUT BEING AFFORDED DUE PROCESS OF THE LAW AS REQUIRED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

During 1972 and 1973, the Alabama

Insurance Commissioner, (Bookout) went trigger-happy in placing numerous Alabama insurance companies in receivership, once his new Alabama Insurance Code had become law. In another lawsuit, depositions were taken of Charles E. Hunter, First Deputy, Alabama Insurance Commissioner (6504-6520) and John G. Bookout, the Alabama Insurance Commissioner (6527-6543) which prove that Empire Life and Petitioner Moody were denied a just, equitable, fair and impartial quasi-tribunal hearing on April 10, 1972, as required before proceeding to confiscate Empire Life from its shareholders.

Q. By Mr. Moore: (6505)

A. Mr. Charles E. Hunter (6504) [First Deputy Alabama Commissioner]

Q. I was a little confused by one of your statements, which I think you quoted Commissioner Bookout when he told you that you had this transaction up for approval and you said something to the effect, "If you can get rid of Moody, get rid of one." What does that mean?

A. The way I took it, he said if you can sell that thing and get rid of one of the Moodys, go ahead and sell the company, is the way I took it.

Q. What sort of relationship had he had with the Moodys--- is that a derogatory statement in your thing?

A. Well, the way he said it, it looked like he was wanting to get rid of of the company so that he could get rid of one of them.

Q. What would be the basis for that statement?

A. I--I really don't know what the basis was, you (6508) know, just wanted to get rid of one of them, since Empire was in recievership and his brother, Shearn was running it.

Q. And that didn't have a thing in the world to do with this company, did it?

A. No, sir. (6509)

Q. About this conversation with Mr. Bookout, in which it has been one or more times euphemistically stated "If you can get rid of a Moody, get rid of one," did he ever limit it to one Moody specifically?

A. No, sir, he just said, "if you can get rid of a Moody, get rid of one."

Q. How many did you have doing business up there?

A. Shearn Moody and Bobby Moody (6520).

Q. By Mr. Collins: (6527)

A. By John Bookout, Alabama Insurance Commissioner (6527).

Q. Did you ever make a statement to Mr. Bookout-to Mr. Hunter, Mr. Bookout, concerning Mr. Robert Moody's company? And your desire to get rid of it out of Alabama?

A. Robert Moody's?

Q. (nodded to indicated affirmative reply)

A. I have talked a lot about Shearn Moody's (6543)

Q. You don't ever recall making the statement to him, "If you can get rid of a Moody, get rid of them"?

A. Not in relation to Bobby. I didn't know Bobby Moody; I only met him one time prior to this thing coming out. And that was just to shake hands and say "Hello". (6543)

The preceding testimony documents that John Bookout, the Alabama Insurance Commissioner was prejudiced toward Empire and arbitrarily devalued Empire Life's p]rincipal asset, the Libbie Shearn Moody Trust by some $10,000,000. Clearly, Empire's policyholders, stockholders, and creditors were denied the due process of law guaranteed by the Fourteenth Amendment.

WHEREFORE, for the foregoing reasons, Petitioenr Shearn Moody, Jr. prays that his Reply to Respondent's Brief in Opposition be granted.

Respectfully submitted,

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PROOF OF SERVICE

Proof of Service of three copies of Petitioner's Reply to Respondent's Brief in Opposition upon each of the parties separately represented by counsel was filed by FRANK G. NEWMAN, a member of the Bar of the United States Supreme Court on the same date the Reply was filed.